

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN KEENAN, through his guardian  
KATHLEEN COX,

Plaintiffs,

vs.

TOYS "R" US, INC.,

Defendant.

Case No. 2:05-cv- 00615-APG-VCF

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW**

The non-jury trial of this matter took place on January 13, 14, 17, 21, and 24, 2014. The Court has reviewed the admitted exhibits and considered the trial and submitted deposition testimony of the witnesses. Pursuant to Fed. R. Civ. P. 52(a)(1), the Court makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

1. Plaintiff Kathleen Cox is the sister of Plaintiff John Keenan
2. Defendant Toys "R" Us, Inc. ("TRU") is a toy and juvenile products retailer.
3. TRU employed Mr. Keenan from approximately August 8, 1992 until June 14, 2001 as an at-will employee.
4. Mr. Keenan, was born in 1950 with birth defects, and then suffered a serious head injury in a childhood accident. Everyone in his family recognized he was mentally challenged.
5. Mr. Keenan has been gainfully employed since he was eighteen years old.
6. Mr. Keenan lived with his mother all of his adult life. In 1992, they moved to Las Vegas, into a home shared with his sister (Ms. Cox) and her family. Mr. Keenan's and Ms. Cox's mother died in 1995.
7. Ms. Cox has been and continues to take care of Mr. Keenan, providing him a home, transportation, and handling his personal and financial affairs.

1           8.     In August 1992, Ms. Cox looked for a job for her brother close to their home. She  
2     inquired at the Meadows Lane TRU store, filled out a job application for Mr. Keenan, and spoke  
3     with a manager or assistant manager (named Travis) about her brother's capabilities and limitations.  
4     She mentioned his lack of education, but that he had been employed as a maintenance person for  
5     over 20 years at Sage Allen, a department store in Connecticut. On the application she disclosed that  
6     Mr. Keenan had attended a "special school."

7           9.     Ms. Cox testified she told Travis that Mr. Keenan could perform only maintenance-  
8     type duties. Ms. Cox testified that Travis spoke with Mr. Keenan about his being a custodian and  
9     hired him immediately.

10          10.    The retail toy industry is very competitive, and TRU distinguishes itself from its  
11    competitors by emphasizing superior customer service. Every visit by every customer is designed to  
12    be an exceptional experience, and TRU's employees are critical to that positive customer experience.

13          11.    Mr. Keenan knew of and understood TRU's high customer-service expectations and  
14    requirements.

15          12.    Mr. Keenan's job description listed customer service as an essential job function.

16          13.    Mr. Keenan's annual reviews had a specific category for "customer service."

17          14.    Mr. Keenan can recognize simple words and symbols, write his own name and  
18    numbers, copy printed words, and identify letters. Mr. Keenan cannot drive a car or handle his own  
19    finances, and appears to be unable to live on his own.

20          15.    Some of Mr. Keenan's mental challenges are apparent to a reasonable, adult-aged  
21    person observing and speaking with him for more than a few minutes. However, it is not apparent  
22    that he can read and write only a little unless he is observed trying to perform those tasks.

23          16.    Many of Mr. Keenan's TRU co-workers recognized that there was something  
24    different about Mr. Keenan, that he was a little "slow," that he might not be able to read, and that he  
25    rode a bicycle to work. He was never asked to perform functions like cashiering or answering the  
26    phones. Other non-disabled TRU workers likewise did not perform some of those functions.

1           17. Over time, Mr. Keenan's job duties at TRU evolved. He helped with unloading  
2 trucks, stocking shelves, wrangling shopping carts in the parking lot, renovating stores, and dressing  
3 up as the TRU mascot Geoffrey the Giraffe.

4           18. Mr. Keenan enjoyed dressing up and playing Geoffrey the Giraffe. In that role, he  
5 interacted with children and adults, but was not permitted to speak. That same restriction applied to  
6 all employees who played Geoffrey, so that the only Geoffrey voice children would know would be  
7 the voice heard on TRU commercials.

8           19. All of the positions at TRU require some customer interaction, and Mr. Keenan had  
9 regular interaction with TRU's customers for several years.

10          20. Over the years, Mr. Keenan received recognition and awards from TRU and from  
11 customers based on his positive customer service.

12          21. Numerous witnesses testified that Mr. Keenan regularly interacted with customers  
13 during the duration of his employment at TRU.

14          22. Mr. Keenan enjoyed helping customers at TRU, and when they asked him something  
15 he did not know, he would find another employee to help the customer.

16          23. Former customer and employee Kevin Cooney testified via his deposition that Mr.  
17 Keenan was very helpful finding merchandise (a "go-to guy"), and had great knowledge of certain  
18 items sold at TRU.

19          24. By all accounts, Mr. Keenan was a good and hard worker when properly instructed;  
20 he worked well with customers (within limits); he worked extra hours and off hours when needed  
21 (e.g., during store renovations); and he was well-liked by most of the other employees.

22          25. However, on March 18, 2001 and April 14, 2001, TRU counseled Mr. Keenan for  
23 inappropriate communications with guests. The March 18, 2001 counseling review form states that  
24 TRU would not tolerate future episodes of poor behavior towards guests. In addition, Ms. Cox was  
25 aware of prior instances of counseling for Mr. Keenan's customer service violations in April 1995,  
26 September 1995, and May 1998.

1           26.     On June 13, 2001, customer Ashley Einig visited the TRU store on Meadows Lane in  
2 Las Vegas, Nevada. Ms. Einig was accompanied by her then-boyfriend James Calvert. The young  
3 adults went to the baby section to buy a gift.

4           27.     While shopping, Ms. Einig placed a paper soda cup on a box on the shelf so that she  
5 could pick up some toys for a closer look. When Ms. Einig proceeded down the aisle, she forgot that  
6 she had left the paper cup behind.

7           28.     Mr. Keenan approached Ms. Einig, rudely yelled at her as if she was a child, and  
8 ordered her to pick up the paper cup and throw it in the trash.

9           29.     Mr. Keenan yelled at Ms. Einig so loudly that Elizabeth Pelikan, a TRU associate,  
10 could hear him as she assisted another customer on the opposite side of the aisle. Concerned about  
11 the source of the commotion, Ms. Pelikan walked to the other side of the aisle and observed Mr.  
12 Keenan yelling at Ms. Einig.

13          30.     Ms. Einig was shocked by Mr. Keenan's inappropriate treatment of her. His yelling,  
14 unprofessional tone of voice and body movement made her uncomfortable.

15          31.     Ms. Einig was particularly taken aback by Mr. Keenan's behavior in part because she  
16 worked as a customer service representative at Friendly Ford. She expressed that the car dealership  
17 would never tolerate an employee yelling at or arguing with its customers.

18          32.     Mr. Keenan followed Ms. Einig back to the aisle to pick up the cup and continued to  
19 follow her to the trash can where she threw the cup away.

20          33.     Ms. Einig and Mr. Calvert immediately stopped shopping and walked to the front of  
21 the store, where Ms. Einig complained to a manager about Mr. Keenan's inappropriate conduct.

22          34.     The Store Manager, Jeff Brooks, asked Ms. Einig to write a voluntary statement  
23 documenting Mr. Keenan's behavior. Ms. Einig handwrote a statement documenting the incident,  
24 then left the store without purchasing any items.

25          35.     During her deposition, Ms. Einig described the way she was treated as "rude,"  
26 "harsh," "shocking," "aggressive," and "unprofessional."

1           36. Mr. Brooks also spoke to Ms. Pelikan, who explained that she heard Mr. Keenan  
2 yelling at Ms. Einig for leaving the cup on the shelf. Mr. Brooks asked Ms. Pelikan to document her  
3 observations which she did in her written statement.

4           37. After Ms. Einig left the store, Mr. Brooks called Mr. Keenan in to a meeting to  
5 discuss the incident. Mr. Keenan admitted confronting Ms. Einig about leaving a cup on a shelf.  
6 Mr. Brooks told Mr. Keenan that TRU could not tolerate such inappropriate behavior from its  
7 associates. Mr. Keenan was remorseful and understood that he had done something wrong.

8           38. At the conclusion of the meeting, Mr. Brooks informed Mr. Keenan that Mr. Brooks  
9 was required to contact the TRU HR representative (Joy Stich, who was located in Rialto,  
10 California) to obtain guidance as to the appropriate disciplinary action. As a Store Manager, Mr.  
11 Brooks did not have the authority to terminate Mr. Keenan's employment.

12           39. Mr. Brooks did not suspend or fire Mr. Keenan. However, Mr. Keenan believed he  
13 had been fired. He left the meeting, immediately turned in his TRU employee's vest, and left the  
14 store without clocking out or speaking to anyone.

15           40. After his meeting with Mr. Keenan, Mr. Brooks called Ms. Stich and left her a  
16 message because she was unavailable.

17           41. That evening, Ms. Cox found Mr. Keenan sobbing in his bedroom, and learned that  
18 TRU had apparently fired him.

19           42. Either later that evening or the next day, Ms. Cox went to the TRU store to discuss  
20 the incident and to ask Mr. Brooks to give Mr. Keenan his job back.

21           43. Mr. Brooks confirmed that Mr. Keenan had yelled at a customer who had simply left  
22 a paper cup on the shelf. Ms. Cox offered to have Mr. Keenan see a doctor and to seek ways for him  
23 to address the problem. Mr. Brooks informed Ms. Cox that he did not have the authority to make  
24 decisions about termination of employment, and thus he would have to wait for direction from Ms.  
25 Stich.

26           44. Ms. Stich subsequently spoke to Mr. Brooks, who informed her of the situation. Ms.  
27 Stich expressed that Mr. Keenan's altercation with the TRU guest was inappropriate, unacceptable,  
28 and could not be tolerated by any employee.

1           45.     Ms. Stich decided that TRU would not re-employ Mr. Keenan.

2           46.     By a letter dated June 19, 2001, Ms. Cox, acting as the informal representative of her  
3 brother, asked the TRU Store Manager for a copy of her brother's personnel file.

4           47.     On June 28, 2001, in a phone conference with Ms. Cox in response to her June 19,  
5 2001 letter, Mr. Brooks told Ms. Cox to call the TRU legal department and gave her the phone  
6 number.

7           48.     On July 7, 2001, Ms. Cox sent TRU Executive Vice President of Human Resources  
8 Michael D'Ambrose a letter stating that her brother had been wrongfully terminated, and that Mr.  
9 Brooks should have made an ADA accommodation by "explain[ing] to the customer that [Mr.  
10 Keenan] sees the store as his 'personal responsibility,' and he could have explained to [Mr. Keenan]  
11 that, although the customer should not have left a cup in the aisle, it wasn't right to scold her." Ms.  
12 Cox did not want her brother re-hired at the Meadows Lane TRU store because of the lingering bad  
13 feelings about the incident, but instead requested compensation for the way he was treated.

14           49.     There is no evidence that the TRU decision-maker (Ms. Stich) had any animus toward  
15 Mr. Keenan because he was disabled or perceived as such. Ms. Stich testified via her deposition that  
16 she did not know that Mr. Keenan was disabled.

17           50.     No evidence was presented that able-bodied employees at TRU mistreated customers  
18 without discipline.

19           51.     Mr. Keenan's employment at TRU was not terminated for an inability to drive, read,  
20 or write. Rather, his termination was due to poor treatment of a customer. As such, to the extent  
21 Mr. Keenan was disabled due to an inability to drive, read, or write, it is irrelevant to the outcome of  
22 this case.

23           52.     Mr. Keenan did not suffer from a disability that entirely prevented him from  
24 interacting with customers. To the contrary, over the years he often interacted with customers on a  
25 limited basis and received commendations for such work.

26           53.     Mr. Keenan understood that sales associates were "to be nice to customers."

27           54.     Several witnesses testified (live or via deposition) that TRU is a service business,  
28 customer service is very important, it is never proper for a store employee to be rude to a guest or

1 customer, and that violations of TRU policy that threaten TRU's relationship with its guests are  
2 taken very seriously and may be cause for immediate termination.

3 55. TRU was so serious about customer service that it instituted a "Disney" style training  
4 program to help its employees create a magical, Disneyland-like experience for every TRU  
5 customer.

6 56. Being rude to a customer is a direct violation of TRU policy and clear grounds for  
7 termination without the need for progressive discipline, even for a first offense.

8 57. Although unclear, it is irrelevant whether Mr. Keenan was fired or mistakenly walked  
9 off the job. Even if he had not resigned, his employment would have been terminated for his  
10 mistreatment of Ms. Einig. TRU chose not to rehire Mr. Keenan because of his misconduct in being  
11 rude to a customer.

12 58. When TRU hired Mr. Keenan in 1992, and at various times during the course of his  
13 employment with TRU, Ms. Cox requested various accommodations for him. TRU honored all of  
14 those requests during the duration of his employment.

15 59. TRU made the accommodations requested by Ms. Cox without requiring her to fill  
16 out any forms. Thus, completing a form was not a prerequisite to a reasonable accommodation.

17 60. TRU presented no evidence that any of the accommodations or workplace  
18 adjustments previously accorded Mr. Keenan before 2001 presented any hardship, much less an  
19 undue hardship.

20 61. The former Store Director for the Meadows Lane TRU (Bruce Weber) testified via  
21 deposition that he knew that Mr. Keenan needed more supervision because "he was a little slow,"  
22 but that he treated Mr. Keenan like he treated all of the other employees, and this did not present an  
23 undue hardship. Mr. Weber testified that if he had known Mr. Keenan could not read or write, he  
24 would have accommodated him, and this would not have been an undue hardship.

25 62. Prior to Mr. Keenan's mistreatment of customer Ashley Einig, Ms. Cox never spoke  
26 to Store Manager Jeff Brooks about her brother or anything else. Plaintiffs never made a complaint  
27 about Mr. Brooks' treatment of Mr. Keenan before Mr. Keenan was counseled about his  
28 mistreatment of Ms. Einig.



1           63.     Nobody ever asked TRU to prevent Mr. Keenan from interacting with customers, nor  
2 did Plaintiffs want Mr. Keenan's contact with customers limited or eliminated.

3           64.     There is no evidence in (1) Dr. Frank Paul's report, (2) Dr. Carmena's note, (3)  
4 Plaintiffs' own testimony, (4) any witness's testimony, nor (5) Mr. Keenan's employment history  
5 that Mr. Keenan was inherently unable to interact with customers due to a disability.

6           65.     Ms. Cox testified that the reasonable accommodation that should have occurred in  
7 this case would have been for Mr. Brooks to explain to the customer (Ms. Einig) that Mr. Keenan  
8 has special needs and did not mean to offend her.

9           66.     Ms. Cox admits that Mr. Keenan should have been disciplined for his mistreatment of  
10 Ms. Einig, but she disagrees with the level of discipline given.

11           67.     According to TRU policy, the incident involving Ms. Einig was a sufficient basis for  
12 TRU to terminate and/or not rehire Mr. Keenan.

13           68.     Ms. Cox secured replacement employment for Mr. Keenan: first at Commercial  
14 Hardware from January 2002 through 2008, and then at Smith's Food King from 2009 to present.

15           69.     After investigating Mr. Keenan's charge of discrimination against TRU, the Nevada  
16 Equal Rights Commission ("NERC") concluded that the "evidence did not meet the legal criteria for  
17 establishing that discriminatory acts occurred." The U.S. Equal Employment Opportunity  
18 Commission subsequently "adopted the findings" of the NERC.

19                           **CONCLUSIONS OF LAW**

20           1.     TRU is an employer that is required to fully comply with the Americans with  
21 Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and Nevada state statutes prohibiting  
22 discrimination on the basis of disability.

23           2.     TRU admitted in its March 12, 2002 letter to the NERC that some of its managers and  
24 associates knew that Mr. Keenan was "slow." Moreover, "because he was perceived to be slightly  
25 mentally challenged, managers would routinely clarify his understanding of documents he was  
26 signing by verbally reiterating what the documents stated."



1           3.       Plaintiffs have the burden of proof in this case to prove by a preponderance of the  
2 evidence that TRU unlawfully discriminated against Mr. Keenan on the basis of his disability. As a  
3 matter of law, Plaintiffs failed to meet their burden.

4           4.       Mr. Keenan's employment was not terminated because he was disabled or perceived  
5 as such.

6           5.       An employer is not required to "withhold discipline or termination of an employee  
7 who, because of a disability, violated a conduct rule that is job-related for the position in question  
8 and consistent with business necessity." *EEOC Enforcement Guidance: Reasonable Accommodation*  
9 *and Undue Hardship Under the Americans with Disabilities Act*, p. 20, question #34 (emphasis  
10 omitted).

11          6.       "An employer never has to tolerate or excuse violence, threats of violence, stealing,  
12 or destruction of property. An employer may discipline an employee with a disability for engaging  
13 in such misconduct if it would impose the same discipline on an employee without a disability." *Id.*

14          7.       "An employer must make reasonable accommodation to enable **an otherwise**  
15 **qualified employee with a disability** to meet . . . a conduct standard **in the future**, barring undue  
16 hardship, except where the punishment for the violation is termination. Since reasonable  
17 accommodation is always **prospective**, an employer is not required to excuse past misconduct even  
18 if it is the result of the individual's disability." *Id.* (question #35, emphasis in original).

19          8.       "Almost all of the circuits to rule on the question have held that an employer has a  
20 mandatory obligation to engage in the interactive process and that this obligation is triggered either  
21 by the employee's request for accommodation or by the employer's recognition of the need for  
22 accommodation." *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) *vacated sub nom.*  
23 *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

24          9.       An employer's lack of investigation into the reasonable accommodation and failure to  
25 engage in the interactive process is not actionable where the plaintiff cannot show the availability of  
26 a reasonable accommodation under the ADA. *Broussard v. Univ. of Cal.*, 192 F.3d 1252, 1259 (9th  
27 Cir. 1999) (citing *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997)).  
28

1           10.     Ms. Cox's recommended accommodation (i.e., explain Mr. Keenan's mental  
2 challenges to the customer) is not reasonable because the harm to the employer (a very upset  
3 customer) has already occurred, many customers do not complain about mistreatment (and therefore  
4 the employer can lose customers without knowing of the problem), and it violates Mr. Keenan's  
5 rights by causing co-workers to explain to customers that he is a "special-needs" employee.

6           11.     "Recognizing interacting with others as a major life activity of course does not mean  
7 that any cantankerous person will be deemed substantially limited in a major life activity. Mere  
8 trouble getting along with coworkers is not sufficient to show a substantial limitation. . . . In  
9 addition, the limitation must be severe or, in other words, substantial when compared to the ability of  
10 'the average person in the general population.' . . . [A] plaintiff must show that his 'relations with  
11 others were characterized on a regular basis by severe problems, for example, consistently high  
12 levels of hostility, social withdrawal, or failure to communicate when necessary.'" *McAlindin v.*  
13 *Cnty. of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999) (citations omitted) *opinion amended on*  
14 *denial of reh'g*, 201 F.3d 1211 (9th Cir. 2000), *cert. denied*, 530 U.S. 1243 (2000).

15           12.     Mr. Keenan did not have severe problems on a regular basis when interacting with  
16 customers. To the contrary, his negative interactions were few, and he received several  
17 commendations for positive interactions with customers.

18           13.     Assuming, *arguendo*, that Mr. Keenan had a disability that precluded him from  
19 interacting with customers, such a limitation could not be reasonably accommodated as a matter of  
20 law without causing an undue hardship. Moreover, no positions existed at TRU that did not involve  
21 customer interaction. In addition, Plaintiffs did not want Mr. Keenan permanently barred from  
22 interacting with customers.

23           14.     There was nothing "complex" about the interaction between Mr. Keenan and Ms.  
24 Einig.

25           15.     Plaintiffs have not rebutted TRU's legitimate nondiscriminatory business reason for  
26 its employment decisions toward Mr. Keenan (based on his mistreatment of Ms. Einig), and have not  
27 met their burden of establishing pretext.  
28


1           16. Federal statutes proscribing employment discrimination, such as the ADA, were not  
2 intended as a vehicle for the general judicial review of business decisions. *See Douglas v. Anderson*,  
3 656 F.2d 528, 534 (9th Cir. 1981).

4           17. This Court does not sit as a super personnel department to re-examine an entity's  
5 business decisions. *See e.g., Sharpe v. American Tel. & Tel. Co.*, 66 F.3d 1045, 1050 (9th Cir.  
6 1995) (the Ninth Circuit has long held that discrimination laws do not give courts authority to second  
7 guess business decisions); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002)  
8 (it does not matter for purposes of discrimination if the proffered justification for an employment  
9 action was "foolish or trivial or even baseless"); *see also Dale v. Chicago Tribune Co.*, 797 F.2d  
10 458, 464 (7th Cir. 1986); and *Green v. Maricopa County Cmty. College Sch. Dist.*, 265 F. Supp. 2d  
11 1110, 1128 (D. Ariz. 2003) ("The focus of a pretext inquiry is whether the employer's stated reason  
12 was honest, not whether it was accurate, wise, or well-considered. We do not sit as a super  
13 personnel department that reexamines an entity's business decision and reviews the propriety of that  
14 decision.") (citations omitted).

15           18. It is unfortunate that TRU terminated (or refused to rehire) Mr. Keenan, who by all  
16 accounts was a good worker who loved TRU and his job there. However, TRU did not act illegally  
17 when it decided that it would no longer employ him.

18           19. Based on the foregoing, Judgment shall be entered in favor of defendant TOYS "R"  
19 US, INC. on all of the Plaintiffs' claims.

20           DATED this 21<sup>st</sup> day of February, 2014.

21  
22   
23 \_\_\_\_\_  
24 ANDREW P. GORDON  
25 UNITED STATES DISTRICT JUDGE  
26  
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